Appeal No. 2009AP2848 **Cir. Ct. No. 2009CV2601**

WISCONSIN COURT OF APPEALS
DISTRICT I

LINDY ORLOWSKI,

PETITIONER-RESPONDENT,

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

RESPONDENT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Curley, P.J., Kessler and Brennan, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2007-08) [1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

In order to determine what the language of an underinsured motorist (UIM) policy requires, and thus whether an arbitration panel[2] exceeded its authority and issued an award that must be modified under WIS. STAT. § 788.11, we must

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The arbitrators found the reasonable value of medical services to Lindy Orlowski; however, they reduced the award by the amount billed by the service providers but not paid by Orlowski, her health insurance carrier, the underinsured motorist or his insurance company.

consider how Wisconsin Supreme Court law in collateral source cases such as ***Koffman v. Leichtfuss***, 2001 WI 111, 246 Wis. 2d 31, 630 N.W.2d 201, and ***Leitinger v. DBart, Inc.***, 2007 WI 84, 302 Wis. 2d 110, 736 N.W.2d 1, effects our holding in ***Heritage Mut. Ins. Co. v. Graser***, 2002 WI App 125, 254 Wis. 2d 851, 647 N.W.2d 385, where we held that collateral source law is inapplicable to any UIM policy.[3] If ***Graser*** is incompatible with controlling supreme court law, we have no power to withdraw or modify language in ***Graser*** to resolve the conflict. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

BACKGROUND

Lindy Orlowski sustained injuries in a motor vehicle accident arising out of the negligence of an underinsured motorist. After recovering the policy limit from the underinsured motorist's liability carrier, she brought a claim under her UIM policy against State Farm Mutual Automobile Insurance Company. Orlowski and State Farm submitted the claim to arbitration under the terms of the UIM policy.[4] The UIM policy, as relevant to this appeal, provides:

[3] Since the release of ***Heritage Mut. Ins. Co. v. Graser***, 2002 WI App 125, 254 Wis. 2d 851, 647 N.W.2d 385, the apparent conflict between its holding and those of ***Koffman v. Leichtfuss***, 2001 WI 111, 246 Wis. 2d 31, 630 N.W.2d 201 and ***Leitinger v. DBart, Inc.***, 2007 WI 84, 302 Wis. 2d 110, 736 N.W.2d 1, has been arising with some frequency in Wisconsin trial courts. Resolving this apparent conflict would be of assistance to trial courts and would have important statewide impact. The Wisconsin Association for Justice, as amicus curiae in this case, attached public documents from three separate cases presently or formerly pending in the trial courts in Milwaukee County. Each case involves the impact of ***Graser*** on what the trial courts have found to be contrary language in the UM/UIM policies involved. We appreciate the amicus curiae bringing the apparently recurring nature of this issue to our attention.

[4] The Wisconsin legislature has recently amended the minimum requirements provided by WIS. STAT. § 632.32(4) for UM/UIM insurance in 2009 Wis. Act 28, §§ 3158, 3159. The parties have not argued that the changes have any impact on the issues presented here, and our independent review of the Act has suggested none.

> UNDERINSURED MOTOR VEHICLE—COVERAGE W
>
> We will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle.

(Emphasis and bolding in original omitted.)

> Limits of Liability
>
> Coverage W
>
> 2. The most we will pay is the lesser of:
>
> a. The limits of liability of this coverage reduced by any of the following that apply:
>
> (1) the amount paid to the insured by or on behalf of any person … that may be legally responsible for the bodily injury; or
>
> (2) the amount paid or payable under any worker's compensation or disability benefits law; or
>
> b. the amount of damage sustained, but not recovered.
>
> Deciding Fault and Amount
>
> Two questions must be decided by agreement between the insured and us:
>
> 1. Is the insured *legally entitled to collect damages from the owner or driver of the* uninsured motor vehicle or *underinsured motor vehicle;* and
>
> 2. *If so, in what amount*?
>
> *If there is no agreement, these questions shall be decided by arbitration upon written request of the insured or us…*
>
> State court rules governing procedure and admission of evidence shall be used.

(Bolding in original omitted; emphasis in original altered; some emphasis added.)

In its initial decision, the arbitration panel found that there was "no negligence on the part of [Orlowski]" and:

> [T]hat the collateral source rule does not apply as per the case of Heritage Mut. Ins. Co v. Graser, 254 Wis. 2d 821 (2002) and, therefore we award $2,325.00 for unreimbursed wage loss; $9,498.55 for the claimed medical lien for the medical bills paid and we also award the plaintiff $2,000 for the out of pocket medical expenses paid by the claimant.
>
> The panel also awards the plaintiff $42,500 for past and future pain, suffering and disability.

The "claimed medical lien" of $9,498.55 was the subrogation claim by Orlowski's health insurance carrier, United Healthcare. Orlowski asked for a supplemental finding of the full reasonable value of her medical expenses. The arbitrators issued a supplemental decision, noting that there was no challenge to the reasonableness and necessity of the medical services. The supplemental decision concluded that:

> [T]he necessary and reasonable value of the medical services provided to Mrs. Orlowski as a result of the accident is Seventy-two Thousand Nine Hundred Eighty-five and 94/100 Dollars ($72,985.94).

The difference between the reasonable value of the medical services ($72,985.94) and the arbitration award for medical expenses ($9,498.55 + $2,000 = $11,498.55) is $61,487.39. The parties stipulated that the difference between the amounts billed and the amount paid by Orlowski and her health insurance was due to insurance company write-offs or reductions, and that Orlowski was no longer responsible for payment of these bills. However, the parties did not stipulate that these damages were not "sustained" as that term is used in the State Farm policy.

Orlowski filed a petition in Milwaukee County Circuit Court asking for modification of the arbitration award pursuant to WIS. STAT. § 788.11 to conform the award to the UIM policy by including the full reasonable value of the necessary medical services she received.[5] The circuit court found that under the UIM policy, Orlowski was legally entitled to collect the full reasonable value of medical expenses from the tortfeasor, thus the arbitrator's refusal to award that amount of the medical expenses was a refusal to apply the plain language of the UIM policy and constituted a manifest disregard of the law. The circuit court modified the award. State Farm appealed.

[5] WISCONSIN STAT. § 788.11 provides:

> **Modification of award. (1)** In either of the following cases the court in and for the county wherein the award was made must make an order modifying or correcting the award upon the application of any party to the arbitration:
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award;
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted;
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> **(2)** The order must modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

State Farm argues on appeal that under ***Graser***, collateral source law is inapplicable to UIM policies, such as Orlowski's. Therefore, the arbitration panel's application of ***Graser*** was not a manifest disregard of the law.[6]

Orlowski responds that the arbitration panel failed to award the amount she is "legally entitled to collect" from the underinsured tortfeasor under the plain language of the UIM policy. Orlowski reasons that the arbitration panel manifestly disregarded the law by ignoring Wisconsin Supreme Court collateral source law when the arbitration panel adopted a lower court holding in ***Graser***, contrary to both the plain language of the UIM policy and to collateral source law.

DISCUSSION

How does collateral source law effect application of this policy?

"Generally, 'language in an insurance contract is given its common, ordinary meaning, that is, what the reasonable person in the position of the insured would have understood the words to mean.'" ***Froedtert Mem'l Lutheran Hosp., Inc. v. National States Ins. Co.***, 2009 WI 33, ¶41, 317 Wis. 2d 54, 765 N.W.2d 251 (citation omitted). If an insurance contract is ambiguous as to coverage, "it will be construed in favor of the insured." ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶15, 275 Wis. 2d 35, 683 N.W.2d 75. "An insurance policy is a contract. A claim against the insurance company for underinsured

[6] Alternatively, State Farm argues that under its policy the disputed amount of unpaid medical bills was not damage "sustained" by Orlowski because she will never be responsible for paying the reduced amount. The totality of the policy limitation is damages "sustained but not recovered." State Farm focuses only on the word "sustained." State Farm does not explain how part of the medical costs—as an element of the damage caused by an injury that has clearly occurred—are not "sustained" because Orlowski will never have to pay anyone for them, while future pain, suffering and disability—also elements of the damage from the injury—were damages "sustained" under the policy, awarded by the arbitration panel here and not challenged by State Farm, yet are also damages for which Orlowski will never have to pay anyone.

motorist coverage is 'an action on the policy and sounds in contract,' although an underlying tortious injury is also involved." ***State Farm Mut. Auto. Ins. Co. v. Gillette***, 2002 WI 31, ¶25, 251 Wis. 2d 561, 641 N.W.2d 662 (citation and footnote omitted).

Wisconsin Supreme Court cases consistently explain the collateral source rule as a principle of damage law. Without limiting the type of collateral source, ***Koffman*** held that a plaintiff "is entitled to seek recovery of the reasonable value of the medical services, without limitation to the amounts paid." ***Id.***, 246 Wis. 2d 31, ¶2. Later, the court in ***Leitinger*** held "that the collateral source rule prohibits parties in a personal injury action from introducing evidence of the amount actually paid by the injured person's health insurance company, a collateral source, … to prove the reasonable value of the medical treatment." ***Id.***, 302 Wis. 2d 110, ¶7. ***Leitinger***, relying on ***Koffman***, also observed that "[t]he reasonable value of the medical services is just one component of what makes the injured plaintiff 'whole.' Other damages include lost wages, future lost wages, loss of earning capacity, etc." ***Leitinger***, 302 Wis. 2d 110, ¶23 n.15 (citations omitted).

In this matter, State Farm promised to pay, up to the stated limits of its policy, "damages for bodily injury an insured is legally entitled to collect" from the underinsured tortfeasor. This amount is limited to the lesser of (1) "payments by or on behalf of" the underinsured tortfeasor, and payments under "any workers compensation or disability benefits law" or (2) "the amount of damage sustained, but not recovered."

The policy repeats the original coverage promise by requiring the arbitrators to answer two questions: (1) whether the insured is legally entitled to collect damage from the underinsured tortfeasor; and (2) if so, in what amount.

The policy further instructs the arbitrators that "[s]tate court rules governing procedure and admission of evidence shall be used."[7] The collateral source rule prohibits evidence of payments by Orlowski's health insurance carrier as a measure of the reasonable value of her medical expenses. *See* ***Leitinger***, 302 Wis. 2d 110, ¶7. Enforcing the unambiguous policy language as written required the arbitration panel to award Orlowski the reasonable value of her medical expenses because that is what she is "legally entitled to collect" from the underinsured tortfeasor.

Is ***Graser*** *consistent with supreme court collateral source law?*

State Farm argues that our holding in ***Graser*** means the collateral source rule does not apply to *any* UIM policy.

Without discussion of *any* of the insurance policy language involved in ***Graser***, we concluded that the collateral source rule "is inapplicable to claims made by an insured under his or her UIM policy." ***Id.***, 254 Wis. 2d 851, ¶1. Thus, we decided ***Graser*** without describing how we performed our obligation to apply an insurance contract as written. *See* ***Froedtert***, 317 Wis. 2d 54, ¶41. Rather than discuss the language of the policy at issue, we analyzed the ***Koffman*** decision, as well as one of our decisions, ***Anderson v. Garber***, 160 Wis. 2d 389, 466 N.W.2d 221 (Ct. App. 1991). Much of our discussion in ***Graser*** focused on language in ***Koffman*** considering whether the tortfeasor benefited from the collateral source rule, but we did not consider whether the injured party could collect the full reasonable value of medical expenses from the tortfeasor. ***Graser***, 254 Wis. 2d 851.

[7] *See supra* p. 3.

In ***Koffman***, State Farm insured the tortfeasor. ***Id.***, 246 Wis. 2d 31, ¶1. State Farm argued that the only medical expenses recoverable by the injured party were those paid by the injured party's health insurance carrier. ***Id.*** The focus of the opinion was the extent of the tortfeasor's responsibility to the injured party, not, as here, the insurer's contractual responsibility to its insured. In ***Graser***, we relied on the ***Koffman*** policy explanation of the collateral source rule in the context of the tortfeasor's responsibility to the injured party:

> "Under the collateral source rule a plaintiff's recovery cannot be reduced by payments or benefits from other sources. The collateral source rule prevents any payments made on the plaintiff's behalf or gratuitous benefits received by the plaintiff from inuring to the benefit of a defendant-tortfeasor. The rule is grounded in the long-standing policy decision that should a windfall arise as a consequence of an outside payment, the party to profit from that collateral source is 'the person who has been injured, not the one whose wrongful acts caused the injury.'"

Graser, 254 Wis. 2d 851, ¶8 (quoting ***Koffman***, 246 Wis. 2d 31, ¶29). We rephrased the quoted statement as: "In other words, the policy basis for the collateral source rule is that the legally responsible tortfeasor should not be relieved of his or her obligation to the victim simply because the victim had the foresight to arrange benefits from a collateral source for injuries and expenses." ***Id.***[8]

We further relied on ***Koffman*** for discussion of the purpose of subrogation.

> "By virtue and to the extent of payments made on behalf of another, a subrogated party obtains a right of recovery in an action against a third-party tortfeasor and is a necessary

[8] The UIM policy could be viewed as evidence of the same type of foresight exhibited by Orlowski when she purchased health insurance–she arranged for payment for injuries and expenses she might sustain from a source other than a tortfeasor with limited or no resources. We did not separately discuss in ***Graser*** the purpose of UIM coverage from the perspective of an insured.

> party in an action against such a tortfeasor." In a personal injury action, the purpose of subrogation is to ensure that the loss is ultimately placed with the wrongdoer and to prevent the insured plaintiff from becoming unjustly enriched through a double recovery, i.e., a recovery from the insurer and the liable third party.

Graser, 254 Wis. 2d 851, ¶9 (quoting and referring to ***Koffman***, 246 Wis. 2d 31, ¶33). The ***Koffman*** reference to preventing double recovery "from the insurer and the liable third party," is a reflection of established law that the injured party does not recover both payments which are the subject of an existing subrogation interest and the benefits already received because of the subrogated payment. ***Graser***, 254 Wis. 2d 851, ¶9.

The plaintiff's health insurance carrier in ***Graser*** had waived its subrogation rights. *See* ***id.***, 254 Wis. 2d 851, ¶11. We then discussed our holding in ***Anderson***, a medical malpractice claim where two insurance companies had each paid medical expenses. ***Graser***, 254 Wis. 2d 851, ¶13; *see also* ***Anderson***, 160 Wis. 2d at 392, 397. These companies were not properly joined in the suit against the tortfeasor. ***Anderson***, 160 Wis. 2d at 398. The jury awarded the full amount of medical expenses. ***Id.*** at 392. The trial court reduced the award by the amount paid by the insurers. ***Id.*** at 392-93. The question on appeal was whether Anderson was entitled to a judgment which included the medical expenses paid by the two absent subrogees. ***Id.*** at 400. As we noted in ***Graser***, and held in ***Anderson***, "medical expenses paid by an insurer are properly awarded where the insurer either waives or properly exercises its subrogation rights." ***Anderson***, 160 Wis. 2d at 402. Because the subrogation rights in ***Anderson*** had not been properly exercised, or had been waived, we reinstated the full jury award for medical expenses. ***Id.*** We added a footnote in ***Anderson***, which we partially quoted in ***Graser***, stating that "[w]here an insurer waives its subrogation rights … no

subrogation exists, and the collateral source rule applies." ***Anderson***, 160 Wis. 2d at 401 n.5; *see also* ***Graser***, 254 Wis. 2d 851, ¶11.

Both ***Koffman*** and ***Anderson*** were distinguished in ***Graser*** as cases addressing claims against a tortfeasor and his/her insurance company while ***Graser*** involved an injured party's claim against her UIM insurance company. *See* ***id.***, 254 Wis. 2d 851, ¶12. In making that distinction, we did not take into account ***Gillette***, filed a few weeks prior to ***Graser***, in which our supreme court explained that "[a] claim against the insurance company for underinsured motorist coverage is 'an action on the policy and sounds in contract,' although an underlying tortious injury is also involved." ***Gillette***, 251 Wis. 2d 561, ¶25 (citation and footnote omitted). ***Gillette*** also explains that the two purposes of underinsured motorist coverage are "to put an insurance company in the shoes of an underinsured motorist and to compensate an insured fully for damages incurred up to the policy liability limits." ***Id.***, ¶47. The State Farm insurance policy language cited in ***Gillette*** appears virtually identical to the policy here. *See* ***id.***, ¶11.

When we decided ***Graser***, we also could not have considered the purpose and function of a UIM policy, explained by our supreme court in ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223.[9] The court stated:

> There are two conflicting theories regarding the purpose and function of UIM coverage. Under the first theory, the purpose of UIM coverage is to compensate an insured accident victim when the insured's damages exceed the recovery from the at-fault driver (or other responsible party). … The second theory is that "the purpose of underinsured motorist coverage is solely to put the insured

[9] ***State Farm Mut. Auto. Ins. v. Gillette***, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662, was filed on March 29, 2002; ***Graser*** was filed on April 17, 2002; ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223, was filed July 10, 2002.

> in the same position as he [or she] would have occupied had the tortfeasor's liability limits been the same as the underinsured motorist limits purchased by the insured."

Id., ¶¶17, 18 (some formatting altered; citations omitted; brackets in ***Badger Mutual***).

Under either theory of the purpose or function of UIM coverage, the plain language of the State Farm policy appears to require that Orlowski recover the full reasonable value of her medical expenses. The policy reducing language does not abrogate collateral source damage law.[10]

We are likewise unable to reconcile ***Graser*** with the collateral source holdings in ***Leitinger***. In ***Leitinger***, the health care provider billed $154,818.51 for Leitinger's treatment. ***Id.***, 302 Wis. 2d 110, ¶3. The health care provider accepted $111,394.73 from Leitinger's health insurance company. ***Id.*** This left a difference of $43,424.78 to which the health insurance company asserted no subrogation rights. ***Id.*** Acuity, the tortfeasor's insurance company, sought to introduce evidence of the amount actually paid by the health insurance company to prove the reasonable value of the medical care provided. ***Id.***, ¶5. Our supreme court explained:

> The collateral source rule, as a rule of damages and as a rule of evidence, is premised on certain policy goals. The collateral source rule is designed to protect plaintiffs. Thus courts have allowed plaintiffs to recover the reasonable value of medical services even when those services have been paid for entirely by a collateral source and the plaintiff has made no out-of-pocket payments at all. The collateral source rule protects plaintiffs by guarding against the potential misuse of collateral source evidence to deny the plaintiff full recovery to which he is entitled.

[10] This rule has been abrogated by statute only in the case of medical malpractice litigation. *See* WIS. STAT. § 893.55(7).

Id., ¶31 (footnotes omitted).

It is "[t]he injured person, not the tortfeasor, [who] benefits from the collateral source." ***Id.***, ¶34. The ***Leitinger*** court, explaining its reasoning in ***Koffman***, stated that the collateral source rule "is specifically designed to prevent a discount received by a plaintiff's insurance company from affecting the plaintiff's recovery of the reasonable value of medical services rendered." ***Leitinger***, 302 Wis. 2d 110, ¶44. We are unable to reconcile the explanation of the reasoning in ***Koffman***, as provided by ***Leitinger***, with our analysis of the same reasoning in ***Graser***.

The parties essentially agree that the standard of review of an arbitration award is *de novo,* and is described in ***Lukowski v. Dankert***, 184 Wis. 2d 142, 152, 515 N.W.2d 883 (1994):

> [A]rbitration awards will be vacated when they exceed what is permissible in the contract providing for arbitration. An arbitrator obtains authority only from the contract of the parties and therefore is confined to the interpretation of that contract and cannot ignore that contract when making an award.

Our supreme court also explained that "[c]ourts will vacate an award when arbitrators exceeded their powers through 'perverse misconstruction,' positive misconduct, a manifest disregard of the law, or when the award is illegal or in violation of strong public policy." ***Baldwin-Woodville Area Sch. Dist. v. West Cent. Educ. Ass'n***, 2009 WI 51, ¶21, 317 Wis. 2d 691, 766 N.W.2d 591 (citation and footnotes omitted). "When there is no contractual language that would allow for the arbitrator's construction, there is no reasonable foundation for the award." ***Id.***, ¶23. Here, the plain language of the contract requires State Farm to pay the damages which Orlowski "is legally entitled to collect" from the underinsured

tortfeasor. Under existing supreme court law, Orlowski appears entitled to collect from the tortfeasor the fair value of her medical expenses, without reduction for any difference between the amount paid by her health insurance company (which has a subrogation right) and the fair value of her medical expenses. The arbitration panel did not make its award based on that standard, as the UIM policy requires.

In ***Graser***, the arbitration panel found that the reasonable value of the medical expenses totaled $79,983.57 and that the plaintiff's health insurance carrier had paid $45,217.52 of those expenses. ***Id.***, 254 Wis. 2d 851, ¶¶1, 4, 5. We noted that the plaintiff's health insurance carrier settled its subrogation claim with the underinsured tortfeasor's insurance company for $20,000 and waived its remaining subrogation claim. ***Id.***, ¶3. Thus, the subrogation claim for the additional $20,000 no longer existed. The arbitration panel awarded the insured the UIM policy limit of $200,000, reduced by the $45,217.52 paid by the insured's health insurance (to satisfy the $79,983.57 medical expenses), for a net award of $154,782.48. ***Id.***, ¶¶4-5. We sustained the arbitration award of $154,782.48. ***Id.***, ¶16. The effect of the award was to allow the insured to recover from her UIM carrier the approximately $35,700 "discount" on the billed medical expenses while denying recovery of the amount attributable to the waived subrogation claim. This result was simultaneously consistent and inconsistent with collateral source law. *See* ***Koffman***, 246 Wis. 2d 31, ¶2 (A "plaintiff is entitled to seek recovery of the reasonable value of the medical services, without limitation to the amount paid."); *see also* ***Anderson***, 160 Wis. 2d at 401 n.5 ("Where an insurer waives its subrogation rights … no subrogation exists, and the collateral source rule applies.") (internal citation omitted).

To apply the plain language of the contract here, it would be necessary to modify, overrule or withdraw language from ***Graser***. We are unable to reconcile our holding based on public policy in ***Graser*** with our obligations to apply the plain language of the insurance contract to the facts and to follow substantive collateral source law as explained in ***Koffman*** and ***Leitinger***. We have no power to overrule, modify or withdraw language from ***Graser***. *See* ***Cook***, 208 Wis. 2d at 189-90 ("[O]nly the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.").

For all of the foregoing reasons, we certify this case to the Wisconsin Supreme Court for resolution.